Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Jack Strassweg, Rich Krohn and Clifford Romain,
Petitioners

v.

United States of America
Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In a prosecution for hunting dove over bait under the Migratory Bird Treaty Act (16 U.S.C. §704 (b) (1)), the applicable federal regulations specifically allow hunting over "top sown wheat" (wheat which is spread on a prepared seed bed or field, but which seed is neither covered nor tilled into the earth) if the spreading is a part of a "normal agricultural operation" or a normal soil stabilization practice". Both the trial court and the appellate court found that two small areas of "excessive" wheat in or adjacent to the hunted fields to be "accidental seed spill". Notwithstanding those findings the court went on to find that the intent of the person(s) spreading the seed, as found in *United States v. Brandt*, did not apply because, as they said, "it is the effect the spill could have…not the intent of the individual that caused the spill". Petitioners suggest that court's decision removes any requirement of intent from the criminal statute and further adds an additional burden of considering the effect of an accidental spill, which is part and parcel of both a "normal agricultural operation" and a "normal soil stabilization practice". Petitioners seek a writ of certiorari directing the appellate court to overturn the convictions of petitioners.

PARTIES TO PROCEEDING

I hereby certify that the following persons have interest in the outcome of this case:

1. David L. Huber, United States Attorney, Western District of Kentucky.

2. James H. Barr, Assistant United States Attorney, Western District of Kentucky.

3. Randy Ream, Assistant United States Attorney, Western District of Kentucky.

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OPINIONS BELOW

By published opinion, the Sixth Circuit affirmed the conviction of petitioners. See *United States v. Strassweg et al.*, __F.3d __, 2005 WL (6th Cir. Decided 4 August, 2005) appended hereto as Appendix A.

The opinion of the United States District Court is found at *United States v. Strassweg*, 337 F.Supp.2d 956 (W.D. Ky. 2004).

STATEMENT OF JURISDICTION

The United States District Court for the Western District of Kentucky had original jurisdiction over this criminal case pursuant to 18 U.S.C. §3231. An appeal from that court's final judgment proceeded for review by the United States Court of Appeals for the Sixth Circuit, in accordance with 28 U.S.C §1291 and 18 U.S.C. §3742. This Court's jurisdiction is invoked by the timely filing of this Petition for Writ of Certiorari. See 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

16 U.S.C. §704: It shall be unlawful for any person to:

> "(b)(1) take any migratory game bird by the aid of baiting, or on or over any baited area, if

person knows or reasonably knows or should know that the area is a baited area; or"

16 U.S.C. §707(a) Penalties,

> "...any person who shall violate...any regulation...shall be deemed guilty of a misdemeanor...and shall be fined not more than $15,000 or be imprisoned not more than six months..."

18 U.S.C. §2, Principals:

> "(a) Whoever commits an offense against the United Sates or aids, abets, counsels, commands, induces or procures its commission, I punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

50 C.F.R. §20

> "§20.11(h) *Normal agricultural operation* means a normal agricultural planting, harvesting, post-harvest manipulation, or agricultural practice that is conducted in accordance with official recommendations of State Extension Specialists of the Cooperative Extension Service of the U.S. Department of Agriculture.

§20.11(i) *Normal soil stabilization practice* means a planting for agricultural soil erosion control or post-mining land reclamation conducted in accordance with official recommendations of State Extension Specialists of the Cooperative extension Service of the U.S. Department of Agriculture for Agricultural soil erosion control.

§20:(4) Hunting Over Top-Sown Seeds: (para. 4)

"...the proposed rule included a change to prohibit the hunting of all migratory game birds over any lands planted by means of top sowing or aerial seeding where seeds remained on the ground as a result. The prohibition was intended to apply regardless of the purpose of the seeding, and top sowing was explicitly excluded from the proposed term, normal agricultural and soil stabilization practice. We received 221 comments about this issue. The majority of comments opposing this change reflected concern that the change could restrict a valid agricultural practice affecting large areas of land, and discourage both habitat management and migratory game bird hunting in those areas. Other comments reflected concern that this change would adversely affect a time-honored, traditional form of hunting, for doves over prepared agricultural fields."

§20:(4) Hunting Over Top-Sown Seeds: (para. 4)

"After careful consideration, we will not prohibit the hunting of migratory game birds over lands planted by means of top sowing or aerial seeding. Instead, we will allow the hunting of any migratory game bird, including doves, over lands planted by means of top sowing or aerial seeding if seeds are present solely as the result of a normal agricultural planting, or a normal soil stabilization practice…

Whether agricultural plantings, harvestings, post-harvest manipulations, operations, or soil stabilization practices are "normal" must be gauged against an objective standard. Therefore, this rule incorporates our policy to rely upon State Extension Specialists of the Cooperative Extension Service of the U.S. Department of Agriculture (USDA) as the best source of factual and objective information on recommended planting, cultivation, harvest, and utilization of agricultural crops. These State Extension Specialists make recommendations about agricultural practices that may vary from state-to-state or region-to-region within a state. The recommendations may be site specific, and may or may not be published. However, the Service will continue to make

final determinations about whether the official recommendations were followed."

STATEMENT OF THE CASE

Petitioners were originally charged (3 October 2003) in an information in the United States District Court, Western District, Owensboro Division, with placing bait on a dove field, in violation of 16 U.S.C. §§703, 704(b)(2) and 707(c) and with aiding and abetting each other in such conduct, 18 U.S.C. §2. Petitioners Strassweg and Krohn were further charged with taking or shooting dove over bait, 16 U.S.C. §§703, 704(b)(1) and 707(a).

There followed a Superseding Information (23 January 2004) which charged Strassweg and Krohn with taking dove over bait and Romain with aiding and abetting the two other petitioners. The superseding information did not contain a count as to placing or putting out bait. The offenses were alleged to have occurred on 1 September 2002.

The case was tried non-jury on 23 February 2004. Both at the close of the government's case and following close of all of the evidence Petitioners moved for a directed judgment of acquittal. Both were denied. The Order and Judgment was entered on 17 August 2004, finding Strassweg and Krohn guilty of hunting over bait and Romain guilty of aiding and abetting. Petitioners were fined $500

each and they filed Notice of Appeal on 2 September 2004.

The convictions of all Petitioners were affirmed on the 4 August 2005, by the United States Court of Appeal for the Sixth Circuit and this Petition for Writ of Certiorari was timely filed on or before 2 November 2005.

STATEMENT OF THE FACTS

Petitioners owned and operated a hunting preserve just south of the Ohio River in Henderson County Kentucky. Over the course of several years they had engaged in significant reclamation work to improve the land by planting of crops, shrub and trees, the building of ponds and reclaiming swamps and sloughs contaminated by salt water from prior oil well injections. The preserve was used by members and paying guests.

Petitioners had, for several years, followed a program of wildlife management in the spring wherein they would plant alternate strips of fields in sunflower, millet and other seed crops which matured in the fall. Between these planted strips were bare strips upon which they spread seed to attract and feed dove, quail, turkeys and other non-game species. In late summer they would cease feeding, disc and fertilize the bare strips and plant them with wheat using a cultipacker. This was for the dual purpose of growing "green patches" for the fall bow season for deer and later, as the wheat